THE MUSIC SHOP SDN. BHD.

v.

YAMAHA MUSIC (M) SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-22-17-93]
7 DECEMBER 1993

INJUNCTION: Application to set aside interim injunction - Injunction obtained to entitle the plaintiff to require the defendant to specifically perform on an agreement - Whether there is in fact a concluded agreement between the parties.

The plaintiff sought to be a licensee and retailer of the defendant in the use of the defendant's Music Education System Courses and the sale of the defendant's musical instruments. The defendant issued a letter dated 15 May 1992 confirming its intention to appoint the plaintiff to be its licensee and retailer for a period of one year subject to the terms and conditions of a Licensing Agreement and a Retailer Agreement to be executed by the plaintiff within 14 days of the plaintiff's incorporation which took place on 23 May 1992.

There was a dispute with regard to certin clauses in the agreements and it was only on 30 November 1992 that the plaintiff signed and returned the agreements, with the addition of a further clause in respect of its right to claim compensation in the event of wrongful and unwarranted terminations, to the defendant. This additional clause was not acceptable to the defendant who counter-proposed and informed the plaintiff that failure to accept the counter-proposal would mean that there was no agreement existing between them. The plaintiff did not accept the counter-proposal and obtained the *ex-parte* injunction on 11 January 1993.

It was the plaintiff's contention that as at 30 November 1992, when it signed the two agreements, there was already a legal relationship existing between the parties which could be enforced by the interim injunction. The plaintiff further contended that the defendant had led it to believe that its appointment was a matter of course and that the execution of the two agreements was only a formality in reliance of which the plaintiff had done a lot of preparatory acts and expended large sums of money.

Held:

[1] The dispute how clauses 6 and 9 should be worded in the two agreements continued well after the plaintiff signed the two agreements on 30 November 1992 and it was very clear that no agreement had been reached as far as clauses 6 and 9 were concerned. In the circumstances no concluded agreements had been reached between the parties that entitle the plaintiff to have them enforced by the interim injunction.

[2] Even if the plaintiff was led to believe that an oral agreement existed between them, that agreement had already lapsed as under the terms of the defendant's letter of offer dated 15 May 1992, the plaintiff's appointment was only for a term of one year and was terminable by the giving of 3 months written notice. In the circumstances the agreement had expired, on 15 May 1993, by affluxion of time and by its solicitors' letter dated 11 January 1993, the defendant had given the 3 months written notice required under the agreement.

[3] If indeed the plaintiff had suffered damages by its preparatory acts to get the music school going, such damages are easily identifiable and as such damages would be an adequate remedy.

[Defendant's application to set aside interim injunction allowed with costs].

For the plaintiff - R.K. Nathan; M/s. R.K. Nathan & Co.
For the respondent - Foo Yet Ngo (D. Bhaskaran with her); M/s. Shearn Delamore & Co.

JUDGMENT

Siti Norma Yaakob J:

The instant application before me is by the defendant to set aside an interim injunction obtained by the plaintiff on 11 January 1993, and the only contentious issue is whether there is any concluded agreement reached between the parties that entitles the plaintiff to have it specifically performed by the defendant through the issue of the injunction.

The plaintiff's business relationship with the defendant stems from the plaintiff's desire to be a licensee and retailer of the defendant in the use of the defendant's Music Education System Courses and the sale of the defendant's musical instruments.

For that purpose and even before the incorporation of the plaintiff, one Madam Kher Chu Chwan approached the defendant and following discussions between them, the defendant issued a letter dated 15 May 1992, confirming the defendant's intention to appoint the plaintiff, once incorporated, to be its licensee and retailer for a period of one year subject to the terms and conditions of a Licensing Agreement and a Retailer Agreement to be executed by the plaintiff within 14 days of the plaintiff's incorporation. Copies of the 2 agreements were enclosed together with the letter.

Clause 5(1) of the proposed Licensing Agreement sets out 8 instances of events which entitle the defendant at any time to terminate the agreement forthwith by the giving of written notice to the plaintiff. Sub-section (2) of the same clause gives power to either party to terminate the agreement at any time by the giving of 3 months' written notice. Clause 6 provides that regardless of the circumstances of the termination, no party shall be liable to the other for any kind of compensation, reimbursement or damages upon termination. Clause 15(1) confirms that the agreement shall continue to be in force for one year from the date when it becomes operative. The same 3 provisions also appear in the Retailer Agreement at clauses 8(1) and (2), 9 and 20.

Following the issue of the defendant's letter dated 15 May 1992, the plaintiff proceeded to organise and establish itself as a music school and in this respect, the defendant extended its facilities and services to the plaintiff. The plaintiff found suitable premises in Bangsar Park, executed a tenancy agreement dated 9 June 1992, for the premises for a term of 3 years, purchased musical instruments from the defendant, engaged employees to run and manage the school, advertised and printed catalogues of the services to be provided by the school and started enrolling students.

The plaintiff was incorporated on 23 May 1992, but this was only made known the defendant on 21 July 1992, well after the period of 14 days for the signing of the 2 agreements as stipulated in the defendant's letter had expired. The defendant did not make an issue of this but instead prepared and signed copies of the 2 agreements and handed them to the plaintiff for execution. This was done on 23 July 1992. For the next one month nothing was heard from the plaintiff about the agreements nor were the agreements returned duly executed to the defendant.

Then by letter dated 21 August 1992, the plaintiff objected to certain clauses in the 2 agreements, including clauses 5(1) and 6 of the Licensing Agreement and the corresponding clauses 8(1) and 9 of the Retailer Agreement. The plaintiff contended that these clauses were one sided, in favour of the defendant, and requested that the offending clauses be amended or deleted before they sign the agreements. This was the first time that the plaintiff raised objections to certain clauses in the agreements.

On 7 September 1992, a meeting was held to resolve the objections raised by the plaintiff but nothing came out of this meeting as the defendant was not prepared to amend the agreements in the manner suggested by the plaintiff, as the agreements were standard agreements applicable to all its licensees and retailers. Accordingly, on 16 September 1992, the defendant gave the plaintiff 7 days written notice to sign and return the agreements, failing which the defendant would treat that the plaintiff was no longer interested in the appointments.

After the 7 days, when it became clear that the plaintiff was not going to sign the agreements, further negotiations took place between the parties from 24 September 1992, to 23 December 1992. During this period, the defendant met the plaintiff half-way by reviewing and amending a number of clauses in both agreements and continued extending their services to the plaintiff.

These amendments were confirmed by the plaintiff in its letter dated 21 October 1992, which also enclosed a draft letter of the assurances to be given by the defendant in respect of clause 6 of the Licensing Agreement and clause 9 of the Retailer Agreement on the terms set out in the draft letter. The terms were:

(1) that the defendant shall not invoke s. 6 or s. 9 as a defence in any claim for damages, reimbursements or compensation arising out of any wrongful or unreasonable termination of the agreements by the defendant.
(2) the two clauses shall not be a bar to any claim or action for damages, reimbursement or compensation brought by the plaintiff for the wrongful or unreasonable termination of the agreements by the defendant.

The defendant was not prepared to give such assurances but was agreeable to give the only assurance that it will only exercise its right to terminate the agreements in reasonable circumstances and this was notified to the plaintiff on 4 November 1992.

The plaintiff's response to this was to insist on its right to compensation for wrongful termination and this is contained in its letter dated 5 November 1992

On 25 November 1992, the defendant handed the signed agreements incorporating all amendments agreed so far, together with the letter giving their assurance, to the plaintiff.

On 30 November 1992, the plaintiff signed and returned the agreements to the defendant but added a further clause in respect of its right to claim compensation in the event of wrongful and unwarranted terminations.

This additional clause was not acceptable to the defendant and in a last attempt to resolve the issue, the defendant wrote to the plaintiff on 9 December 1992, proposing limited compensation and the plaintiff was given time until 18 December 1992, to accept such proposals, failing which the defendant will consider that no Licensing Agreement or Retailer Agreement exist between them.

The plaintiff did not accept the proposals for limited compensation, threatened legal proceedings against the defendant and on 11 January 1993, obtained the *ex parte* injunction against the defendant.

On that very same day too, the defendant's solicitors wrote to the plaintiff's solicitors reiterating its stand that the proposed appointments of the plaintiff as licensee and retailer have since lapsed but if the plaintiff was under the mistaken belief that there had been such *de facto* appointments by virtue of the defendant's letter dated 15 May 1992, offering such appointments for one year, then the defendant's letter of 11 January 1993, also serves as a notice terminating such *de facto* appointments to take effect on 11 May 1993, well in excess of the 3 months period of notice of termination as envisaged by the defendant's original offer.

It is the plaintiff's contention that as at 30 November 1992, when it signed the 2 agreements, there was already a legal relationship existing between them which can be enforced by the interim injunction. This contention cannot be right as at that point of time, there was still no agreement on clause 6 of the Licensing Agreement and clause 9 of the Retailer Agreement. It must be remembered that the plaintiff first questioned the inclusion of these 2 clauses as being one sided and had wanted to have them deleted altogether. The defendant had counter-offered that in line with similar agreements with its other licensees and retailers, it was not prepared to have both clauses deleted but was prepared to give a separate written assurance that it would only exercise its right to terminate the 2 agreements in reasonable circumstances. This is evidenced by the defendant's letter dated 4 November 1992. However, the plaintiff considered that such an assurance was not sufficient as it also wanted an assurance that its right to compensation or other relief shall not be barred in the event of the defendant exercising its right to terminate the 2 agreements without cause. This added assurance is clearly outside the ambit of the assurance the defendant was prepared to give but nonetheless in an attempt to resolve the whole dispute, the defendant met the plaintiff half-way and proposed limited compensation to the plaintiff in the event of unwarranted terminations and these proposals are contained in its letter dated 9 December 1992. The plaintiff refused to consider these proposals altogether, threatened legal action and came to Court to obtain the interim injunction.

The dispute how clauses 6 and 9 should be worded in the 2 agreements continued well after the plaintiff signed the 2 agreements on 30 November 1992, and it is very clear that no agreement had been reached as far as clauses 6 and 9 were concerned and under these circumstances I consider that no concluded agreements had been reached between the parties that entitle the plaintiff to have them enforced by the interim injunction.

The plaintiff has also submitted that the defendant had led it to believe that its appointments as Licensee and Retailer were as a matter of course and that the execution of the 2 agreements was only a formality. Assured of this belief, it had done a lot of preparatory acts to get the music school started, expended large sums of money in the process and had entered into a tenancy agreement for a period of 3 years. The defendant was all too aware of this for it had given its facilities and services to the plaintiff from the moment it had indicated its intention

to appoint the plaintiff as its Licensee and Retailer.

Whilst it is true that the defendant went along with the plaintiff by providing its support to the plaintiff, there is still the underlying agreement that their business relationship was to be governed by the terms and conditions of the 2 agreements to be executed with the mutual consent of both parties. This was not the case here and if indeed the plaintiff was led to believe that an oral or *de facto* agreement existed between them, that agreement has already lapsed as under the terms of the defendant's letter of offer dated 15 May 1992, the plaintiff's appointments were only for a term of one year, terminable by the giving of 3 months written notice. Thus the agreement has expired by affluxion of time, on 15 May 1993, and by its solicitors' letter dated 11 January 1993, the defendant had given the 3 months written notice. In any event, as at 11 January 1993, when the interim injunction was obtained, I consider that there was no concluded contract reached between the parties.

The interim injunction is couched in terms that are mandatory in nature and the plaintiff must establish a very strong case to maintain the injunction. In this case, I consider that no strong case has been made out by the plaintiff as there is no concluded contract to be enforced. Even if a *de facto* agreement had existed between the parties, this agreement has since expired by affluxion of time and by a notice of termination validly given.

If indeed the plaintiff had suffered damages by its preparatory acts to get the music school going, such damages are easily identifiable and hence damages would be an adequate remedy.

From my finding that no concluded agreement had been reached between the parties, I had allowed with costs the defendant's application to have the interim injunction obtained on 11 January 1993, set aside.

The plaintiff then applied orally for an *Erinford* injunction to maintain the *status quo.* As I have already concluded that there was no concluded agreement between the parties, there is therefore no *status quo* to maintain and in any event, the granting of an *Erinford* injunction defeats the whole purpose of my dissolving the interim injunction in the first place. For that reason I dismissed the plaintiff's oral application for an *Erinford* injunction pending appeal.

UNION UAP INSURANCE

v.

FADARA YACHT SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO. D5-22-940-92]
3 NOVEMBER 1993

INJUNCTION: Plaintiff obtaining ex parte injunction against defendant - Defendant applying to set aside injunction after a lapse of a year - Whether defendant's application should be allowed - Whether injunction should be set aside.

PRACTICE & PROCEDURE: Plaintiff a foreign company - Defendant applying for security for costs - Whether Court ought to order security for costs - Whether defendant's application for deposit of RM250,000 as security for costs excessive.

The plaintiff was granted an order in terms of their application to, *inter alia*, restrain the defendant from delivering, selling or transferring a boat to any other person until after the trial of the action or until further order.

Just over a year later the defendant applied to set aside the writ of summons or in the alternative the interlocutory injunction and also applied for an order that the plaintiff deposit the sum of RM250,000 as security for costs in the matter.

Held:

[1] The plaintiff has a cause of action in the matter and there are serious questions to be tried. The balance of convenience was in favour of the continuation of the injunction since the boat had been tendered as security for the relevant loan and the dissolution of the injunction would ultimately mean the loss of this security.

[2] It has been a matter of practice that a plaintiff out of the jurisdiction should give security for costs. However the sum of RM250,000 sought by the defendant was excessive and in the circumstances a sum of RM30,000 was more appropriate, the said sum to be deposited within three weeks of the said order.

[Defendant's application to set aside the writ of summons or alternatively, the injunction, dismissed with costs. Plaintiff ordered to deposit the sum of RM30,000 as security for costs].